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Nos. 02-1238, 02-1386 & 02-1405

IN THE

Supreme Court of the United States

JEREMIAH W. (JAY), NIXON,
ATTORNEY GENERAL OF MISSOURI,
Petitioner,

- AND -

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES,
Petitioner,

- AND -

SOUTHWESTERN BELL TELEPHONE, L.P.,
FKA SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* UNITED TELECOM COUNCIL IN SUPPORT OF RESPONDENTS

JILL M. LYON
BRETT KILBOURNE *
UNITED TELECOM COUNCIL
1901 Pennsylvania Avenue, NW
Fifth Floor
Washington, DC 20006
(202) 872-0030

* Counsel of Record

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STATEMENT OF QUESTION PRESENTED

1. Whether Section 253(a) of the Communications Act of 1934 authorizes the FCC to preempt state barriers to entry against municipal providers of telecommunications.

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	2
I. Section 253(a) Plainly Authorizes the FCC to Eliminate Barriers to Entry That Prevent *Any* Entity from Providing Interstate or Intrastate Telecommunications Service	3
II. Congress Clearly Intended to Encourage Both Public and Private Utilities to Provide Telecommunications.	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Alden v. Maine, 527 U.S. 706 (1999) 6
City of Bristol v. Earley, 145 F. Supp. 2d 741 (W.D. Va. 2001) 4
Georgia Power Co. v. Teleport Communications Atlanta, 2003 WL 2222863 (11th Cir. 2003) 5
Gregory v. Ashcroft, 501 U.S. 452 (1991) 4
Gulf Power Co. v. FCC, 208 F.3d 1263 (2000) 5
Missouri Municipal League v. FCC, 299 F.3d 949 (2002) 4, 5
National Cable & Telecomms. Ass'n., Inc. v. Gulf Power Co., 534 U.S. 327 (2002) 5
Pennhust State School and Hospital v. Halderman, 465 U.S. 89 (1984) 5, 6
Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002) 5, 6
Salinas v. United States, 522 U.S. 52 (1997). 4, 5, 6
Southern Co. Servs. v. FCC, 313 F.3d 574 (D.C. Cir. 2002) 5
Southern Co. v. FCC, 293 F.3d 1338 (11th Cir. 2002) 5
United States v. Albertini, 472 U.S. 675 (1985) 6

CONSTITUTION AND STATUTES

U.S. Const. Amend. XI 5, 6
5 U.S.C. § 34 7
28 U.S.C. §1367(d) 5, 6
47 U.S.C. § 224 7
47 U.S.C. §§ 224(a)(1),(3) 8
47 U.S.C. §§ 253(b) and (c) 2
47 U.S.C. § 253 ..... *passim*
Mo. Rev. Stat. §392.410(7)(West Supp. 2003) 2
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 2

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

Page

American Public Power Association, *2003 Annual Directory & Statistical Report* 8

American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), *at* http://www.appanet.org/legislative regulatory/broadband/CommunityBroadbandFact.pdf 8

Black's Law Dictionary (7th ed. 1999) 5

H.R. Rep. No. 104-458, 104th Cong., 2d Sess. (1996)..... 3, 9

S. Rep. No. 103-367, 103d Cong., 2d Sess. (1995)..... 7

REGULATIONS

Implementation of Section 703(e) of the Telecommunications Act, Report and Order, 13 FCC Rcd. 6777 (1998)..... 5

In re Amendment of Commission's Rules and Policies Concerning Pole Attachments, Order on Reconsideration, 16 FCC Rcd. 12101 (2001)..... 5

In the Matter of The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities. Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, Memorandum Opinion and Order, CC Docket 98-122, FCC 00-443, 16 FCC Rcd 1157 (2001)..... 4, 9

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* [1] UNITED TELECOM COUNCIL IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

The United Telecom Council ("UTC") respectfully submits this brief as amicus curiae, pursuant to Rule 37 of the Rules of this Court, in support of Respondents.

[1] In accordance with this Court's Rule 37.6, UTC respectfully states that this brief was authored entirely by counsel for the named *amicus curiae* identified on the cover and signature pages hereof, and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICUS CURIAE*

The United Telecom Council ("UTC") is the global trade association for the telecommunications and information technology interests of the utility, pipeline and other critical infrastructure industries. The membership of UTC is composed of large investor-owned utilities that serve millions of customers to small municipal utilities and cooperatively organized utilities that serve only a few thousand customers each. The Missouri statute at issue in this case prevents municipal utilities from offering telecommunications services themselves or telecommunications equipment to other competitive carriers. As such, the interests of UTC are directly affected through the municipal utility members that are subject to Missouri jurisdiction. Moreover, the instant appeal will have an indirect impact upon the interests of UTC to the extent that other states enact similar restrictive laws modeled after the Missouri statute. Therefore, UTC submits its brief as amicus curiae in support of the Respondents pursuant to Rule 37 of the Rules of this Court. The parties to the appeal have consented to the filing of the brief in accordance with Rule 29(a).

SUMMARY OF ARGUMENT

Section 253 of the Communications Act, 47 U.S.C. § 253, plainly applies to "any entity", public or private. Both the text of Section 253 and congressional intent manifested by the legislative history, structure and overall purpose of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, unmistakably direct the FCC to promote competition by preempting state barriers to entry that prohibit or have the effect of prohibiting the ability of any entity to provide an interstate or intrastate telecommunications service. When Congress meant to preserve state authority it did so expressly in Sections 253 (b) and (c), 47 U.S.C. §§ 253(b) and (c), which make no exceptions to the mandate of Section 253(a) for municipal providers of telecommunications. Therefore,

given the mandate of Section 253(a) and absent any contrary indication elsewhere in the Act or otherwise, the FCC must preempt the Missouri statute at issue here, Mo. Rev. Stat. §392.410(7)(West Supp. 2003), and others like it that prohibit telecommunications services by municipal utilities.

Congress intended to eradicate such barriers to entry in order to promote telecommunications competition and universal service. Municipal utilities are located in many unserved or underserved areas and possess the resources and expertise to provide telecommunications on either a retail or wholesale basis. Congress acknowledged this, and sought to encourage them to provide telecommunications, at least on a wholesale basis, by ensuring that such service offerings would not entail common carrier regulations. Moreover, it emphatically opposed explicit prohibitions on entry by a utility into telecommunications. Finally, preempting such state restrictions would encourage investment by municipal providers of telecommunications, consistent with Congress's overarching goal of promoting a "pro-competitive deregulatory national policy framework". *See* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. at 1 (1996) (*Conference Report*). Such investment would contribute to economic growth and improve the social welfare in many remote areas served by municipal utilities.

I. Section 253(a) Plainly Authorizes The FCC To Eliminate Barriers To Entry That Prevent *Any* Entity From Providing Interstate Or Intrastate Telecommunications Service

Section 253(a) grants the FCC broad powers to preempt State telecommunications laws or regulations restricting or even discouraging *any* entity from providing *any* telecommunications service. These broad powers are qualified only to the limited extent as provided in subsections (b) and (c). Furthermore, subsection (d) mandates preemption of any such laws or regulations that violate subsection (a) or (b).

Therefore, Section 253 speaks clearly, affirmatively, and with limited express exceptions about the federal-state balance concerning *per se* or *de jure* barriers to telecommunications competition. Federal authority preempts them.

Yet, the FCC attempts to create doubt about its authority despite the broad powers conferred by Section 253. *In the Matter of The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities. Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri*, Memorandum Opinion and Order, CC Docket 98-122, FCC 00-443, 16 FCC Rcd. 1157 (2001) (*Missouri Order*). It claims that it is not clear that Congress considered or intended the FCC to intrude on state sovereignty by preempting such restrictions, and asserts that it can effectuate Section 253(a) without interpreting it to apply to municipal entities. *Id.* To the contrary, the FCC would not effectuate Section 253(a) without protecting municipal telecommunications, which serves the FCC's twin goals of promoting competition and fostering universal service. Nor is it required that the federal law mention the particular application explicitly in order to apply. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991). It simply needs to be plain to anyone reading the Act that Congress intended to alter the federal-state balance in the relevant area. *Salinas v. United States*, 522 U.S. 52 (1997).

By both the ordinary meaning and the context of the terms of Section 253, *any entity*—public or private—may seek preemption of state laws that prohibit or have the effect of prohibiting them from providing telecommunications services. *Missouri Municipal League v. FCC*, 299 F.3d 949 (2002); *accord, City of Bristol v. Earley*, 145 F. Supp. 2d 741 (W.D. Va. 2001). The term "entity" has been broadly defined to include governmental as well as private organizations, not only by the court below, but by the FCC as well. *Id., citing*

Black's Law Dictionary 553 (7th ed. 1999); *and see In re Amendment of Commission's Rules and Policies Concerning Pole Attachments*, Order on Reconsideration, 16 FCC Rcd. 12101, 12133-34, ¶ 59 (2001), *aff'd., Southern Co. Servs. v. FCC*, 313 F.3d 574, 580-581 (D.C. Cir. 2002) (explaining that "attaching entities" in the context of Section 224(e)(2) includes any physical attachment by a government entity, citing Congress's use of the "more general term and more inclusive term 'entity' and 'entities'"); *accord, Georgia Power Co. v. Teleport Communications Atlanta*, 2003 WL 2222863 (11th Cir. 2003).

This broad view of the term "entity" is underscored by the preceding modifier "any", which the courts and the FCC have also interpreted expansively. *See Salinas*, 522 U.S. at 57 (stating that "the word 'any,' which prefaces the [clause at issue], undercuts the attempt to impose [a] narrowing construction.") *and Implementation of Section 703(e) of the Telecommunications Act*, Report and Order, 13 FCC Rcd. 6777, ¶¶ 30, 40 (1998), *rev'd Gulf Power Co. v. FCC*, 208 F.3d 1263 (2000), *aff'd. National Cable & Telecomms. Ass'n., Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) (broadly construing "any" attachment by a cable television operator or telecommunications service provider); *and Southern Co. v. FCC*, 293 F.3d 1338, 1349 (11th Cir. 2002)(plain meaning of "any" is "all" unless specifically limited in statute). Thus, the term "any entity" should apply broadly to municipal utilities that provide telecommunications.

Petitioners and their amici take a narrow view, relying on *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002). *Raygor* declined to construe broadly the term "any claim" in 28 U.S.C. §1367(d) to apply to a dismissal of a pendant state law claim against a nonconsenting state on Eleventh Amendment grounds. *Raygor* was largely influenced by *Pennhust State School and Hospital v. Halderman*, 465 U.S. 89 (1984), which held that the Eleventh Amendment bars the adjudica-

tion of pendent state law claims against nonconsenting state defendants in federal court. It explained that "[o]n its face, subsection (d) purports to apply to 'any claim asserted under subsection (a),'" but given the holding in *Pennhurst*, it could not read Section 1367(d) in isolation to apply broadly to more than the few grounds for dismissal that were expressly contemplated in the context of the statute as a whole.

This case is distinctly different from *Raygor*. Section 253 answers any doubts about the federal-state balance by generally authorizing the FCC to preempt state barriers to entry against public and private telecommunications providers. "Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I of the Constitution." *Salinas*, 522 U.S. at 60, *quoting United States v. Albertini*, 472 U.S. 675 (1985). Given that private entities may avail themselves of Section 253, the Eleventh Amendment would not prevent public entities from doing the same. *Alden v. Maine*, 527 U.S. 706, 756 (1999) (distinguishing for purposes of sovereign immunity between (a) a lawsuit brought by the Federal government and (b) a lawsuit brought by a private person: permitting the former but not the latter.) Moreover, if Congress had intended to preserve State restrictions on municipal telecommunications providers it would have done so expressly in subsections (b) and (c), which it did not. As such, "any entity" may be read broadly to include public as well as private providers of telecommunications, and any authority reserved to the states must be strictly limited to the express provisions of subsections (b) and (c).

II. Congress Clearly Intended To Encourage Both Public And Private Utilities To Provide Telecommunications

The scope of the application of Section 253(a) is informed by its legislative history. The term "any entity" originated in the 103rd Congress, in Section 230(a)(1) of the Senate

bill entitled S. 1822. As Congress explained in the report accompanying that bill, it defined certain key terms, such as "telecommunications service" and "telecommunications carrier" to apply broadly to "*all* entities" or "*any* provider of telecommunications service"—including explicitly electric utilities—unless those utilities offered solely bulk fiber optic capacity. S. Rep. No. 103-367, 103d Cong., 2d Sess. at 56 (1995) (*Senate Report on S. 1822*) (emphasis added). More importantly, this exception for bulk fiber capacity was carried over in the context of then-Section 230 to apply specifically to "*State and local governments*", so that they "may sell or lease capacity on these facilities to some entities and not others without violating the principle of nondiscrimination." *Id.* (emphasis added). Therefore, Congress did expressly consider electric utilities as "entities" for purposes of the definition of a "telecommunications service", and it specifically identified municipal utilities in the context of then-Section 230. In each separate provision, Congress sought to encourage electric utilities to provide telecommunications by exempting their wholesale bulk capacity offerings from regulations or restrictions that might otherwise apply.

Sections 103 and 703 of the Telecommunications Act of 1996 reinforce indications in the legislative history that Congress intended to remove barriers that would prevent all utilities from providing telecommunications. *See* 5 U.S.C. § 34 and 47 U.S.C. § 224. Section 103 provides an exemption for "registered holding companies" under the *Public Utility Holding Company Act of 1935 (PUHCA)* that enables them to offer telecommunications and other communications services through affiliates. Congress explained that Section 103 was intended to encourage utilities to enter the marketplace by allowing affiliates of registered holding companies to compete on the same basis as all other electric utilities. *Senate Report on S. 1822*, at 3. Congress also added Section 703(g), which requires utilities that provide telecommunications to impute the costs of their pole attachments,

further indicating that Congress anticipated that utilities would provide telecommunications. Note that pole attachments is the only context in which Congress distinguished between public and private utilities, exempting from regulation a "utility" that is owned by the Federal Government—or any State—which it defined as "any State, territory or possession of the United States, the District of Columbia, or *any political subdivision, agency or instrumentality thereof.*" *See* 47 U.S.C. §§ 224(a)(1), (3). Therefore, in the context of the Communications Act as a whole, Section 253 should apply to state barriers that prevent municipal utilities from providing telecommunications.

Indeed, municipal utilities have answered Congress's call to provide telecommunications, particularly in rural areas. In fact, nineteen of the eighty-eight municipal utilities in Missouri alone currently offer telecommunications. *See* American Public Power Association, *2003 Annual Directory & Statistical Report*. Furthermore, at the end of last year 511 public power systems offer some kind of broadband services. Of those, many either lease fiber optic capacity or serve municipal data networks, which typically do not compete on a retail basis with private carriers. *See* American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), at http://www.appanet.org/legislativeregulatory/broadband/CommunityBroadbandFact.pdf. (*Community Broadband Fact Sheet*). Still, many others provide cable modem, local or long distance services that typically compete with carriers on a retail basis. *Id.*

By providing telecommunications on a retail or wholesale basis, municipal utilities are able to offset some of the costs of deploying communications infrastructure that support their core electric services. Moreover, such services make efficient use of capacity that may be available on utility networks. Finally, as they tend to serve rural areas, even the FCC

recognizes that "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." *Missouri Order*, 16 FCC Rcd. at 1162. These benefits not only reduce rates and improve the quality of commercial communications service, but also enable municipal utilities to improve the efficiency and reliability of the essential electric services that they provide to the public at large. As such, allowing states free reign to prohibit municipal utilities from competing in the telecommunications marketplace frustrates Congress's overarching goal of the Telecommunication Act of 1996 as a whole "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all markets to telecommunications competition." *Conference Report*, at 1.

CONCLUSION

For the foregoing reasons, UTC, as *amicus curiae*, respectfully requests that the Court affirm the decision below.

Respectfully submitted,

JILL M. LYON
BRETT KILBOURNE *
UNITED TELECOM COUNCIL
1901 Pennsylvania Avenue, NW
Fifth Floor
Washington, DC 20006
(202) 872-0030

* Counsel of Record

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